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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

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MAR 23 2004

FILE: EAC 98-125-53503 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with the beneficiary's Form I-130, Petition for Alien Relative, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. The petition was filed for classification of the beneficiary under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act) as a skilled worker. As required by statute, the petition was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL).

The petitioner's Form ETA 750 was filed with DOL on January 5, 1998 and certified by DOL on February 24, 1998. The petitioner subsequently filed Form I-140 with CIS on March 13, 1998, which was approved on June 23, 1998. The director never issued a request for evidence or notice of intent to deny the Form I-140. The merits of the Form I-140 have never been in question. An application for lawful permanent residence (Form I-485) in connection with the approved Form I-140 was pending at the time the director issued the NOIR.

The approval of this petition was revoked as a result of the beneficiary's other immigrant visa petition. A Form I-130, Petition for Alien Relative (Form I-130), was filed on the beneficiary's behalf on January 3, 1995. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary, photographs, and a copy of a Certificate of Marriage between the beneficiary and "Jacky Lopez."

In connection with the Form I-130, a decision was issued by the district director of the CIS office located in New York on April 26, 1996. The decision denied the Form I-130 because the beneficiary and his spouse failed to appear for an interview, scheduled for July 26, 1995, concerning the merits of the family-based immediate relative immigrant visa petition. The decision granted the beneficiary until May 26, 1996 to voluntarily depart the United States.

In August 1997, the beneficiary retained counsel to request a complete copy of his immigration file under the Freedom of Information Act (FOIA). A full copy of the beneficiary's file, which would have included all of the forms and notices in connection with the Form I-130, was provided to the beneficiary's attorney of record at that time on January 14, 1998. A month later, the beneficiary had an employment-based visa petition filed on his behalf. No other notice or correspondence was received from the beneficiary or a representative of the beneficiary to update or correct representations made on the Form I-130 or supporting documents until several years later when he received notice that the approval of his employment-based visa petition was going to be revoked.

The Form I-140 was approved on June 23, 1998, and the beneficiary filed Form I-485 with supporting forms and documentation on September 15, 1998, which remains pending. On December 6, 2000, the beneficiary's pending Form I-485 was relocated to CIS's Business Branch for consideration of revoking the underlying I-140 petition pursuant to section 204(c) of the Act.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)¹ no petition shall be approved if

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

On June 14, 2001, the director sent a NOIR to the petitioner stating the following:

It has now come to the attention of [CIS] that we apparently approved the petition in error. The apparently erroneous approval is not based on any statements or misrepresentations made by . . . the petitioner. Rather, the problem involves a Form I-130 . . . that was denied by the district office. Although the case was terminated due to lack of prosecution (the [beneficiary] and his alleged spouse failed to appear for an interview), the record contains sufficient probative and substantive evidence, in accordance with Section 204(c), to establish that the [beneficiary] was party to prior fraud by attempting to gain an immigration benefit based on a false marriage.

The NOIR provided a detailed list of discrepancies contained in the beneficiary's records, including the fact that the details concerning the beneficiary's spouse were changed on the Form I-130. The NOIR specified the following discrepancies:

1. [The beneficiary] is shown to have no prior spouses in block #11 of the Form I-130;
2. [The beneficiary's] Form G-325A (Biographical Information sheet), filed with the Form I-130, contains obvious alterations where information about [the beneficiary's] real spouse has been removed and has been replaced with information about his alleged U.S. citizen spouse;
3. [The beneficiary's] Form G-325A filed with Form I-130, alleges that he has no prior spouses;
4. [The beneficiary's] birth certificate, filed with Form I-130, is of extremely poor quality;
5. [The beneficiary's] photocopied passport identity page, filed with the Form I-130, contains obvious alterations pertaining to his name and his date of birth (note the different type fonts);
6. The [U.S. citizen] birth certificate of [the beneficiary's] alleged spouse, filed with the Form I-130, contains obvious alterations pertaining to her name, date of birth, and parents' names (note the different type fonts);

¹ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

7. The photocopied marriage certificate, filed with Form I-130, may be fraudulent;
8. [The beneficiary's] Form I-485, filed concurrently with the Form I-130, contains obvious alterations in Part B where information about his real spouse has been removed and replaced with information about his alleged [U.S. citizen] spouse;
9. [The beneficiary's spouse's] Form G-325A, filed with her dependent Form I-485 [sic]. Confirms her prior marriage to the principle [sic] applicant in 1983 [sic].

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Esteime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out altered documents and possible misrepresentations concerning the number of and dates of the beneficiary's marriages, that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

In response to the NOIR, the beneficiary provided a notarized affidavit in which he states that he was conned by a woman who he knew only as [REDACTED]. He stated that his limited understanding of the English language made it impossible for him to read and understand the forms that he signed. He stated that he trusted [REDACTED] because she worked for lawyers and he believed there were many immigration programs in the United States that could help him. He also stated that he had no idea about the ruse until he tried to extend his employment authorization document and was informed he needed to bring his wife in order to do so. When he went to see his attorney, he was then informed that he was married to a U.S. citizen. This must have occurred in 1996-1997 and the beneficiary still did nothing at this time to try to correct matters. The beneficiary contends in his affidavit that he has always been married to a Brazilian woman named [REDACTED]. The beneficiary also contends that he had no idea how to contact [REDACTED].

In connection with the NOIR response, the beneficiary's counsel provided a copy of an indictment against [REDACTED] from the United States District Court for the Southern District of New York for knowingly making false statements with respect to material facts in applications, affidavits and other documents required by the immigration laws to CIS.

Counsel states the following in his response: "[CIS] is well aware of the dealings of [REDACTED] in New York. Many immigrants were conned into thinking they were involved in a legitimate [CIS] program." Counsel also states the following:

[The beneficiary] did not provide any information regarding a marriage to a US Citizen. He did provide information regarding his true and only wife, [REDACTED]. [The beneficiary] contends that the forms were changed after his meeting with [REDACTED]. If [the beneficiary] was the person who provided false information, there would be no need to change the I-130 documents. The I-130 documents would have initially been prepared with false information.

Finally, [sic] counsel wishes to point out that the existence of the documents in question alone does not establish fraud by [the beneficiary]. Fraud requires intent and/or

knowledge of the misrepresentations. [The beneficiary] vehemently denies any knowledge of the content of I-130 documents or any intent to deceive [CIS]. (Emphasis in original.)

The AAO notes that the assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On August 22, 2001, the director revoked the approval of the I-140 visa petition for the following reason:

Although the beneficiary denies any knowledge of the content of the I-130 documents or any intent to deceive [CIS], the record offers no admission by another party of a second person's alteration of the documents. For this reason it cannot be established that the beneficiary has [sic] not altered information found on the referenced Form I-130.

On appeal, counsel for the petitioner states that CIS failed to consider the evidence and asserts that the director's reason for revoking the employment-based visa petition is defective for expecting the beneficiary to "prove a negative" [provide an admission that someone other than the beneficiary provided false documentation in connection with the Form I-130]. Finally, counsel states the following:

Furthermore, [CIS] incorrectly applies Section 204(c). By its terms, Section 204(c) applies where a "marriage . . . [has] been entered into for the purpose of evading immigration laws", or where "[an] alien has attempted . . . to enter into a marriage for the purpose of evading the immigration laws." Even assuming, *arguendo*, the veracity of [CIS's] allegations, there is no evidence that the beneficiary has done either of these things. At worst, this case involves the submission of fraudulent documents. Therefore, even accepting [CIS's] allegations *arguendo*, all that has actually been alleged is "ordinary" misrepresentation [212(a)(6)(C)]. There has simply been no showing that 204(c) is in any way applicable.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. At the outset, it is indisputable that the marriage between the beneficiary and [REDACTED] was not a valid marriage based on the beneficiary's own affidavit. The beneficiary received an immigration benefit, an employment authorization document (EAD), which temporarily enabled him to live and work in the United States. Even if the AAO accepts the beneficiary's story as true, when the EAD immigration benefit terminated and he realized that a fraudulent immigrant petition had been filed on his behalf, he did nothing, even in spite of learning of [REDACTED] criminal conviction.²

² For example, the beneficiary did not offer to be a witness against [REDACTED] for either that criminal conviction or another prosecution; nor did the beneficiary's distress that his honesty was impugned act as a catalyst for

The beneficiary retained two different attorney representatives and retrieved a full copy of his file, which would have contained all of the Form I-130 paperwork, through a FOIA request after his Form I-130 was denied. He could have attempted to take remedial action at that point (or when his EAD category was interpreted by an attorney in 1997), but instead promptly filed an alternative immigrant petition on Form I-140 to obtain lawful permanent residence and employment authorization.

Counsel states that an alien who seeks to perpetrate a fraud upon CIS would perfect the forms used in making such a fraud first. Thus, counsel suggests, the fact that the beneficiary's forms were altered indicates his innocence. Such an assertion is wholly without merit. There is no evidence concerning who altered or prepared the forms submitted in support of the beneficiary's first adjustment application.

In summary, the record of proceeding contains evidence that a family-based immigrant petition was filed to obtain an immigration benefit for the beneficiary. We have no evidence that the marriage certificate is a fraudulent document. Thus, on the face of the document, a marriage occurred between the beneficiary and [REDACTED]. The beneficiary claims in his subsequent immigration forms that he has only ever been married to [REDACTED]. He also asserts in an affidavit that he "never knew that any of the documents that were sent to [CIS] were false." Thus, the marriage was not authentic. The beneficiary received an immigration benefit from this fake marriage and successfully, albeit temporarily, circumvented immigration laws that would have rendered him subject to removal proceedings. He had two attorney representatives to counsel and advise him concerning the legal consequences of the Form I-130 that was filed on his behalf, copies of which he obtained through a FOIA request. He received notice to depart the United States because a visa petition had been denied. He was informed that his work permit was filed pursuant to a marriage to a U.S. citizen. He creates a tale about a known criminal whose name does not appear on any of the paperwork pertaining to the fake Form I-130. He falsely responded on subsequent immigrant visa paperwork that he had never filed any other applications for lawful permanent residence. And he did nothing to correct the misrepresentations and false petitions that were made on his behalf after he was aware of them.

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. The director correctly analyzed and noted the discrepancies in factual representations throughout the beneficiary's immigration history in the United States. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by CIS to have been entered into for the purpose of evading the immigration laws is affirmed.

ORDER: The appeal is dismissed. The approval of the employment-based immigrant visa petition is revoked.

him to set the record straight with CIS anytime in 1998 through 2001. It is notable that the beneficiary also indicated on his Form I-485, Application for Lawful Permanent Residence, that he had never filed for lawful permanent residence before. Since he had known about the prior family-based I-130 and I-485 petition filings at the time he filed the Form I-485 based on the employment-based petition, this was not an honest answer to that question and further lessens his credibility.